# PROPOSALS RELATING TO SECTION 63 OF THE AUTOMOBILE ACCIDENT INSURANCE ACT

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Minister of Justice

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The Law Reform Commission of Saskatchewan was established by An Act to Establish a Law Reform Commission, proclaimed in November, 1973, and began functioning in February of 1974.

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Mr. Kenneth P.R. Hodges, B.A., LL.B. is Director of Research.

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The Law Reform Commission Act

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

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I. THE SECTION

Section 63 of The Automobile Accident Insurance Act provides that:

> No costs shall be allowed by the court in any proceedings under section 62.

Section 62 provides that actions "to recover benefits or insurance money" shall be taken in the Court of Queen's Bench.[1] The actions referred to in section 62 cover virtually all cases in which an insured seeks recovery from Saskatchewan Government Insurance for personal injury or property damage sustained by him, or compensation for his liability to others under the public liability insurance provided for registered vehicles under the A.A.I.A.

The costs rule established by section 63 is in conflict with the ordinary rule in civil proceedings: a successful litigant is usually entitled to recover costs from the other party. Section 63 is unusual even in the context of statutory automobile insurance plans. It has no parallel in the automobile insurance legislation of Manitoba, British Columbia or Quebec - the other

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[1] The Automobile Accident Insurance Act (A.A.I.A.) R.S.S. 1978, c. A-35.

provinces that provide automobile insurance through Crown corporations.[2]

Although section 63 provides that "no costs shall be allowed by the court" in proceedings to which the section applies, costs have been awarded to S.G.I. against an insured party in at least one case.[3] But even if that case is wrongly decided, section 63 is more onerous in its effect on insureds than on S.G.I. The actions to which section 63 applies usually do not involve large amounts of money, but the court costs may nonetheless be substantial. In the four reported decisions since 1977 in which section 63 was invoked against a successful plaintiff, the damages awarded averaged about $7,500.00. Party and party costs in each case could be expected to be at least 15% of the award, substantially reducing the plaintiff's recovery after payment of his own costs.

A full explanation of the scope of the prohibition on costs in section 63 requires an explanation of the terms "benefits" and "insurance money" in section 62.

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2 Section 33.1(7) of the Manitoba Public Insurance Corporation Act, S.M. 1970, A-180, c. 102 provides that when the corporation defends an action, the costs incurred are the "costs in the cause"; in most cases, disputes between an insured and the insurer under the Quebec Automobile Insurance Act, R.S.Q. 1977, c. A-25 are resolved by an administrative review board, and the matter of costs settled under the rules as to costs established by the board; the British Columbia Insurance (Motor Vehicles) Act, R.S.B.C. 1979, c. 204 makes no reference to costs, leaving it to the court to apply the ordinary rules as to costs.

3 Bashnick v. S.G.I.O. [1976] 4 W.W.R. 271.

"Benefits" are defined by The Automobile Accident Insurance Act as payments made under Part II of the Act for personal injuries.[4] Part II provides compensation for personal injuries sustained by any person in a motor vehicle accident in Saskatchewan.[5] A dispute might arise under Part II between the insured and the insurer over either entitlement to benefits or the amount of compensation.[6] Because the method of calculating benefits under Part II is relatively straightforward, and because benefits are ordinarily available to anyone injured in a vehicle accident, few actions are brought against S.G.I. under Part II. According to information provided by S.G.I., the corporation is involved in no more than a single contested case under this Part each year.

"Insurance money" is defined by the Act to mean a payment made by the insurer under either Part III or Part IV of the Act.[7] Payments are made under Part IV, which governs public liability insurance, only when an insured has been found liable for damages

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4 Section 2(b).

5 Section 22. Section 22 also provides coverage in some cases when injuries are sustained in a vehicle registered in Saskatchewan while out of the province.

6 See, for example, Moosewaypayo v. S.G.I.O. [1981] 2 W.W.R. 577, where S.G.I. was sued by the child of a deceased accident victim who claimed to be entitled to a death benefit payable to the "primary dependent" under the Act. S.G.I. had declined to pay the benefits pending resolution of a dispute between the plaintiff and the deceased's estranged wife, who also claimed "primary dependent" status.

7 Section 2(o).

caused to the person or property of an accident victim. The claim made by the victim will be made against the insured. While S.G.I. may defend on behalf of the insured if the matter goes to court, S.G.I. will not be a party to the proceedings, and section 63 will be of no application.[8] In some cases, however, a dispute may arise under Part IV between the insurer and the insured. An insured party may forfeit insurance coverage for breach of a statutory condition, or fraud in obtaining coverage.[9] In such a case S.G.I. is entitled to refuse to advance insurance money to indemnify the insured for the damages he is required to pay to the victim. An insured can contest the corporation's refusal to indemnify him by bringing an action against S.G.I. Section 63 would be applicable to the action.

Section 63 is most often relevant, however, in disputes under Part III of the Act. Part III provides compensation to insured vehicle owners for damages to their vehicles. Disputes may arise over entitlement to compensation. For example, in Nichols v. S.G.I.O, the corporation maintained that the insured had breached a statutory condition by permitting an unlicensed driver to operate his vehicle. The court held, however, that the condition was not breached since the insured did not act unreasonably in the circumstances of the case in assuming that

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[8] In fact, section 44(1)(c) expressly provides that the corporation is required to indemnify the insured for costs awarded against him in such proceedings.

[9] Section 78.

the driver was licensed. The insured recovered insurance money, but not costs.[10] Similarly, costs have been denied where S.G.I. alleged that an insured was in breach of a statutory condition in failing to report an accident, but the court accepted the insured's explanation for the failure,[11] and where the court concluded that a fire which damaged the insured's vehicle was not, as S.G.I.'s investigation had suggested, the result of arson perpetrated by the insured himself.[12] S.G.I. reports that approximately 25 disputes under Part III are litigated each year.

It would appear that a dispute under Part III over the amount of compensation, rather than entitlement to compensation, cannot be the subject matter of litigation. Statutory condition 9(1) of section 39 provides that:

> In the event of disagreement as to the nature and extent of the repairs and replacements required, or as to their adequacy, if effected, or as to the amount payable in respect of any loss or damage, the question shall be determined by appraisers before recovery can be had under this Part [Part III] whether the right to recover under this Part is disputed or not, and independently of all other questions.

In Bashnick v. S.G.I.O[13], it was held that an appraisal conducted under the authority of statutory condition 9(1) is binding on the

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10 [1984] 5 W.W.R. 349.

11 Moxness v. S.G.I.O. [1977] 3 W.W.R. 393.

12 Wagman v. S.G.I.O. (1984), 31 S.R. 305.

13 Supra.

insurer and the insured, and therefore, not reviewable by a court.[14]

## II. THE RATIONALE BEHIND THE SECTION

A provision similar to section 63 in content was part of the original Automobile Accident Insurance Act enacted in 1946.[15] The Debates and Proceedings of the Legislature at the time the original act was adopted do not indicate the reason for the inclusion of such a provision. Two rationales for the provision seems possible, however.

First, the provision may have been intended to protect the government insurance agency from court costs in order to reduce operating expenses. The common law traditionally gave Crown agents some immunity from costs, but the Crown Suits (Costs) Act, in force in 1946, established the principle that in most civil cases involving Crown agents, normal court discretion to award costs applies.[16] Moreover, the Saskatchewan Government Insurance Act, also adopted in 1946, expressly provided that the ordinary law relating to procedure and costs was generally applicable to

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[14] See also Pfeil v. Simco and Eyre General Insurance Company and McQueen Agencies Ltd. (1986) 45 S.R. 241 (C.A.), in which a similar appraisal requirement applicable to disputes involving hail insurance (statutory condition 15 of the Saskatchewan Insurance Act, R.S.S. 1978, c. S-26), was held to establish a non-reviewable valuation procedure.

[15] S.S. 1946, c. 11, s. 27.

[16] R.S.S. 1978, c. C-51. Originally enacted S.S. 1939, c. 20.

actions by and against the Government Insurance office.[17] But even if the rationale behind section 63 was an extension of the common law relating to Crown agents, that does not provide a valid reason for its continued existence. The common law rule providing Crown agents with immunity from costs was formulated at a time when Crown corporations did not commonly engage in normal business dealings.

A more likely reason for enactment of section 63 was to discourage unnecessary or frivolous litigation, and to keep costs down by requiring each party to take responsibility for his own costs. Such a rationale may have been more appropriate in 1946 than it is today. The scope of The Automobile Accident Insurance Act of 1946 was different in several important respects than its successors. The 1946 Act provided only for no fault compensation for personal injuries, the subject matter now covered by Part II of the present Act.[18] The Statute, then as now, contained a detailed schedule of the compensation to be awarded for various types of injury. Within a statutory framework of this type, the Saskatchewan Goverment Insurance office could be characterized as a merely administrative body responsible for paying out benefits to all those eligible.

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17 S.S. 1946, c. 10, s. 13(2).

18 S.S. 1946, c. 11.

The closest parallel to the insurance program established by the original Act is, in fact, the Worker's Compensation Board. The Government Insurance Office established in 1946 administered a compensation fund for road accident victims just as the Worker's Compensation Board administers a fund for compensation of persons injured on the job. The Workmen's Compensation Accident Fund Act in force in 1946 provided for resolution of disputes about the extent of a worker's claim by a medical referee,[19] and included a strong privative clause providing that decisions of the Board:

> ...shall be final and conclusive and shall not be open to question or review in any court, and no proceeding by or before the Board shall be restrained by injunction, prohibition, or other process or proceeding in any court or be removable by certiorari or otherwise into any court.[20]

The prohibition on recovery of costs in the 1946 Automobile Accident Insurance Act was one of several provisions similarly designed to limit the role of the courts in resolving disputes under the Act. Section 26(1) provided that actions to "recover benefits against the insurer" were to be taken in the District Court, "irrespective of the amount involved", rather than the Court of King's Bench. Section 26(2) provided that a decision of the District Court was to be final. Section 45 prohibited

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19 R.S.S. 1940, c. 302, s. 24.

20 Ibid., s. 64. See also s. 68 providing that "the decisions and findings of the Board upon all questions of law and fact shall be final and conclusive."

proceedings "by way of injunction, mandamus, prohibition or other extraordinary remedy" against the insurer "in respect of any bona fide act or omission in connection with the adminstration or carrying out the provisions" of the Act.

In 1946 the duties of the Government Insurance Office as administrator of the fund established by The Automobile Accident Insurance Act was distinct from its operations as a general insurance company. The office was established in 1946 under "an Act to empower the Government of Saskatchewan to engage in the Business of Insurance (the Saskatchewan Government Insurance Act, 1946)". The Act gave the office broad authority to engage in the business of insurance, but did not give it a monopoly in regard to any class of insurance.[21] In carrying on its insurance business under the Act, the office was in much the same legal position as a private insurer. Section 13 gave the office capacity to sue and be sued in proceedings "arising out of any contracts entered into in relation to the business engaged in or carried on" under the Act. Section 13(2) made the ordinary law of procedure and costs applicable to actions by or against the office. Public liability insurance was required of all drivers

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[21] S.S. 1946, c. 10, s. 3(1)(c) of s. 3(1) permitted the office to carry on the business of automobile insurance.

by an amendment to The Vehicles Act in 1946,[22] but that insurance was not governed by The Automobile Accident Insurance Act and could be obtained from either the Government Insurance Office or a private insurer.

In 1947, The Automobile Accident Insurance Act, 1946 was repealed and a new statute enacted.[23] This statute provided collision insurance similar to that now provided in Part III of The Automobile Accident Insurance Act to owners of registered vehicles. The provisions in the new Act relating to the jurisdiction of the court and costs were identical to those contained in the 1946 Act, except that the provisions now applied to actions to recover "insurance money" under the collision insurance provisions as well as "benefits" under the personal injury provisions.[24]

In 1948, the 1947 Act was amended to provide public liability insurance.[25] These amendments are now incorporated, with higher insurance limits, as Part IV of The Automobile Accident Insurance Act. Only minor changes have been made in the

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22 An Act to amend The Vehicles Act, 1945, S.S. 1946, c. 89, s. 3.

23 The Automobile Accident Insurance Act, 1947, S.S. 1947, c. 15.

24 Ibid., ss. 32-34.

25 An Act to amend the Automobile Accident Insurance Act, 1947, S.S. 1948, c. 15.

scheme of the Act since 1948.[26] The jurisdiction and costs provisions were not changed when public liability insurance was added to the Act.[27] However, the definition of "insurance money" was extended to include payments made by the insurer under Part IV (public liability) of the Act.[28] Therefore, the scope of the jurisdiction and costs provisions were extended to the public liability insurance provided under The Automobile Accident Insurance Act.

The rationale for a prohibition on costs in actions between insureds and S.G.I. that can be identified upon analysis of the 1946 Act cannot justify retention of the prohibition today. With the addition of Part III (collision insurance) and Part IV (public liability insurance), S.G.I. has come to act less like an impartial administrator and more like an ordinary insurance company. In its mode of operation, S.G.I. is now virtually indistinguishable from any other insurance company, except for the partial monopoly it possesses in the automobile insurance field and its mandate to provide insurance at reasonable cost. The corporation gives insurance in return for premiums set at varying amounts based on the degree of risk involved. Inevitably, S.G.I. now comes into conflict with insureds over

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26 Fire and theft insurance was added to S.S. 1949, c. 11. The amendments were consolidated in The Automobile Accident Insurance Act, S.S. 1952, c. 23.

27 See, ibid., ss. 41-43.

28 Ibid., para. 13 of s. 2.

amounts of insurance money due, and liability to pay, just as other insurance companies. Unlike other insurance companies, however, it does not have to pay the insured's costs when it has been found by a court to be liable under the insurance policy.

The insured is in the same position as an insured under an insurance contract with a private company. He pays premiums and, in the event of loss, expects to receive compensation for the loss as set out in the insurance contract. If the company denies liability, the insured goes to court to force payment. The insured under a contract with a private company will receive the benefits due, plus an award of costs to defray his expenses in enforcing his claim; an insured under The Automobile Accident Insurance Act receives, in effect, the benefits due under the terms of the policy, less the costs incurred in enforcing his rights.

An unsuccessful party in an action between a private insurance company and an insured may be penalized by an award of costs in favour of the other party. The ordinary cost rule operates as a disincentive to meritless litigation. Section 63 may, in fact, have the opposite effect. Since costs cannot be assessed against S.G.I., it may prefer to litigate a dispute rather than to seek a settlement. If costs are also unavailable to S.G.I. when it is successful, section 63 may similarly encourage an insured to litigate a weak claim rather than accept a settlement.

## III. CONCLUSION AND RECOMMENDATION

A prohibition on costs awards in litigation between S.G.I. and an insured under The Automobile Accident Insurance Act may have been justified when the prohibition was adopted in 1946. Under the present Automobile Accident Insurance Act, however, S.G.I. operates enough like an ordinary insurance company to be treated like one, at least in regard to costs awards. While S.G.I. is a public agency established to provide a benefit to the public, that in itself is not a valid justification for disentitling an individual plaintiff from his court costs when the corporation has been found liable to pay his claim.

The Commission recommends that section 63 of The Automobile Accident Insurance Act be repealed.